IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 607 OF 1988.

Shrirang Narsing Sarwade
Age: 46,Occ.: Agriculture,
R/o.Hal-Dahiwadi, Tal: Singola,
District Ratnagiri. .... Appellant.

Versus.

1. Shrikant Dattatraya Gayali,
   Age: 18 years.

2. Kiran Dattatraya Gayali,
   Age: 12 years, Minor through his
   guardian mother-Respondent No.4.

3. Chhaya d/o.Dattatraya Gayali,
   Age: 20 years

4. Anusaya w/o.Dattatraya Gayali,
   Age: 40 years, Occ: Household,
   All R/o.Jawale, Taluka Sangola,
   Dist: Solapur. (Since deceased
   through L.Rs. Nos.1 to 3 & 5,
   already on record.)

5. Dattatraya Prabhu Gayali,
   Age: 48, Occ.: Agriculture,
   R/o.Jawalel, Tal. Sangola,
   Dist. Solapur. .... Respondents.

Shri T.D.Deshmukh and Shri A.A.Kumbhakoni for the Appellant.

Shri M.R.Deshpande for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 30th March 2005.

ORAL JUDGMENT.

1. On 22nd December 1988 this Second Appeal was admitted by passing the following order:

> "Counsel heard. Second Appeal admitted - the substantial question of law being whether the Appeal Court erred in holding that sales effected by defendant 2 did not bind the plaintiffs."

I have heard the learned Counsel appearing for the parties on the substantial question of law which is formulated in the above order. With a view to appreciate the rival contentions it is necessary to refer to the facts of the case. The Appeal is filed by the original Defendant No.1. The Respondents Nos.1 to 4 are the original Plaintiffs. The Plaintiffs filed a suit for partition and separate possession. The case of the Plaintiffs is that they are entitled to 4/5th share in the suit land. The original Plaintiff No.4 is the mother of the Plaintiffs Nos.1 to 3 and the husband of the Defendant No.2. The Defendant No.2 purported to sell the suit land under three different sale deeds dated 19th July 1972, 5th October 1972 and 28th May 1974 in favour of the Defendant No.1. The case of the

Plaintiffs is that there was no legal necessity for the Defendant No.2 to sell the suit land which were ancestral joint family properties in favour of the Defendant No.1. A case is made out that the said sale deeds were not binding on the Plaintiffs. It is alleged that the Defendant No.2 was addicted to many vices and for satisfaction of his lust he sold the properties to the Defendant No.1.

2. The Defendant No.1 contested the suit and submitted that the Defendant No.2 sold the suit lands for legal necessity. It is submitted that the Defendant No.1 is the bonafide purchaser of the suit lands for valuable consideration. It is submitted that the sale deeds executed by the Defendant No.2 in favour of the Defendant No.1 were binding on the Plaintiffs.

3. The trial Court dismissed the suit. The trial Court held that the Plaintiffs have established that the suit lands were their ancestral properties. The trial Court also held that the Defendant No.1 has established that the Defendant No.2 sold the suit land for legal necessity and therefore, the sale deeds were binding on the Plaintiffs. The trial Court held that the suit was barred by limitation.

4. An Appeal was preferred by the original Plaintiffs. The Appellate Court has allowed the Appeal and passed a decree for partition and separate possession. The Appellate Court held that the Plaintiffs Nos.1, 2 and 4 are entitled to 3/4th share in the suit land mentioned in paragraph 1(a) and 1(b) of the plaint. It was also held that the sale deeds executed by the Defendant No.2 in favour of the Defendant No.1 are void, and illegal to the extent of 3/4th share of the Plaintiffs Nos.1, 2 and 4 and were not binding on the share of the Plaintiffs. The Appellate Court held that the Defendant No.1 has failed to prove that the suit transactions were made by the Defendant No.2 for legal necessity.

5. Shri Deshmukh appearing for the Appellant submitted that all that was required to be established by the Appellant No.1 was the existence of legal necessity. The legal necessity was established by showing that the Defendant No.2 had borrowed amount from the Land Development Bank and he needed money to repay the dues of the Bank. He submitted that once the legal necessity was established it was not necessary and not required by law that the purchaser should establish that the amount received by way of sale consideration was applied by the Defendant No.2 for repayment of the loan. He submitted that the Appellate court was impressed by the fact that

there was nothing on record to show that the sale proceeds were applied for repayment of the loan to the Bank. He invited my attention to the fact that there was no prayer for declaration made in the suit as regards the nullity or illegality of the three sale deeds executed by the Defendant No.2. He submitted that the alienation made by the Karta of the Joint Family property without legal necessity is not void but is voidable. Placing reliance on the Judgment of the Apex Court reported in AIR 2001 Supreme Court, page 2607 (Vishwambhar and others v/s. Laxminarayana (Dead by LRs.), he submitted that without there being a prayer for setting aside the sale deeds, the suit was not maintainable. He submitted that there was no reference in the plaint regarding avoiding the sale transactions by the Plaintiffs. He submitted that even assuming that the plaint was amended by the original Plaintiffs the said amendment will not relate to the date of institution of the suit and therefore, the claim made in the suit to the extent of challenge to the alienation by the father was barred by limitation. The learned Counsel appearing for the Respondents/original Plaintiffs has relied upon certain decisions of this Court and the Apex Court and has supported the impugned Judgment and Decree.

6. Before adverting to the submissions made, it will be necessary to refer to the findings recorded by the Appellate Court. There cannot be any dispute that the burden of establishing legal necessity was on the purchaser i.e. the present Appellant/Defendant No.1. His case was that the Defendant No.2 was addicted to many vices. He was unable to maintain his family by utilising agricultural income and was indebted. Reliance is placed on the extracts of loan account of Defendant No.2 of the Land Development Bank. The Appellate Court has referred to the extract of loan account. One extract pertains to the period from 1971-1972, the second extract relates to the years 1971 to 1981 and the third extract relates to the year 1981 and 1982. The Appellate Court has recorded a finding that the said extracts show that the Defendant No.2 had taken loan from the Bank from time to time and he was also paying instalments. A finding is recorded that in the year 1981 the entire loan of the Defendant No.2 was discharged by the Government. The Appellate Court held that it was not the case that the Bank had issued notices to the Respondent No.2 and had called upon the Respondent No.2 to pay the said amount and there was no evidence on record to show that there was any pressure from the Bank to repay the said amount.

7. If the findings recorded by the learned Appellate Court are analysed it is apparent that the issue of legal necessity is not decided only on the ground that there was no evidence on record to show that the sale proceeds of the sale of the suit lands were utilised for repayment of the dues of the bank. The Appellate Court has referred to the extracts of loan account of the Defendant No.2 and noted that from time to time loan was taken by the Defendant No.2. However, the Appellate Court has recorded a finding of fact on the basis of the extracts of loan account that the Defendant No.2 was repaying the loan by instalments. It is pertinent to note that the last sale deed was executed in May 1974 and the Defendant No.2 was maintaining the loan account till the year 1981. On the basis of this evidence on record, the Appellate Court has recorded a finding of fact that there was no pressing need for the Defendant No.2 to sell the suit land. The Appellate Court held that there was nothing on record to show that the Bank had called upon the Defendant No.2 to repay the entire amount of loan. The fact that the loan account continued for a considerable time even after May 1974 substantiates the correctness of the findings recorded by the Appellate Court. Whether there was a legal necessity or not is a question of fact and therefore, the findings of the Appellate Court on the said question

are really findings of fact. In a Second Appeal under section 100 of the Code of Civil Procedure, 1908, scope to interfere with the finding of fact is very limited. It is only in those cases where the finding is rendered by ignoring the material piece of evidence or where the finding is perverse, inference can be made in a Second Appal in so far as the finding of fact is concerned. In the case in hand the Appellate Court has considered the oral and documentary evidence on record and has recorded a finding of fact. Even assuming that a different conclusion could have been reached on the basis of the same evidence is not a ground to interfere in a Second Appeal under section 100 of the said Code. Thus there is no scope to interfere with the said finding of fact recorded by the Appellate Court.

8. This brings me to the main submission advanced by Shri Deshmukh based on the failure of the original Plaintiff to pray for declaration or failure to pray for setting aside alienation. In the decision of the Apex Court reported in AIR 1971 SC page 776 (Raghubanchmani Prasad Narain Singh v/s. Ambica Prasad Singh), the Apex Court held that the alienation by the Manager of the joint Hindu family even without legal necessity is not void but is voidable. Reliance is placed by the learned Counsel for the Appellant on an another Judgment of the

Apex Court in the case of Vishwambhar (supra). The said decision arose in a case where suit for recovery of possession was filed by a person on attaining majority. The possession was sought from a purchaser in whose favour the guardian of the minor had transferred the property without permission of the Court as required by section 8 of the Hindu Minority and Guardianship Act, 1956. The Apex Court held that such a transaction effected by the guardian was voidable at the instance of the minor. The Apex Court held that the Plaintiff was required to get the alienation set aside, if he wanted to avoid alienation and regain the property from the purchaser. Before amendment was carried out to the plaint, prayer for setting aside the sale was not there. Such a prayer was introduced by amendment when the suit was being heard. The Apex Court held that the claim for recovery of possession of the property alienated could not have been made without praying for setting aside the sale deeds and the suit as filed originally was not maintainable. The Apex Court held that the amendment of the plaint could not have helped the Plaintiff as the same was carried out after expiry of the period of limitation.

9. Thus the submission of the learned Counsel is that the prayer for setting aside the alienation has become

time barred and therefore, even amendment could not have been allowed. He submitted that if there was no prayer for setting aside the alienation, naturally alienation was binding on the Plaintiffs.

10. It is to be borne in mind that in the present case the plaint proceeds on the footing that the alienation made by the Defendant No.2 were not binding on the share of the Plaintiffs. A specific case is made out in the plaint that there was no legal necessity for making such alienation and the Defendant No.2 was addicted to various vices. The trial Court has framed issue No.3 as regards the existence of legal necessity and the issue No.4 as regards the question whether the sale deeds executed by the Defendant No.2 were binding on the Plaintiffs. Both the parties, therefore, knew and proceeded with the trial with the full knowledge that what was challenged in the suit was alienation made by the Defendant No.2 on the ground that he could not have effected the alienation on the ground of legal necessity. Accordingly the parties led evidence and the findings are recorded by both the Courts below on the said aspect.

11. At this stage reference will have to be made to another Judgment of the Apex Court reported in (2000) 7

S.C.C. page 215 (Santokh Singh & another v/s. Mahant Iqbal Singh). The Apex Court was dealing with a question whether a suit for possession was maintainable in the absence of prayer for declaration of title. The issue before the Apex Court was regarding lease executed in favour of the Appellant in respect of a Trust property and the contention was that the Mahant who executed the lease had no authority to execute the lease. It was contended that the lease was executed without any consideration and without there being any legal necessity and therefore, the lease was void and not binding on the Trust. The Apex Court while dealing with the submissions made held thus:

> "7. It is correct that such a declaration should have been sought. Normally in the absence of such a declaration such a suit would not be maintainable. However, in this case we find that even though there was no prayer to the effect that the lease deed was not valid and/or void and/or not binding, the necessary averments are there in the plaint. The appellants thus knew that the lease deed was being challenged. They met the challenge in their written statement. Thereafter issues namely, issues 4 and 5 had been framed.

> Evidence was led by the parties on those issues. Arguments were advanced on those issues. Therefore, this question has been agitated by the parties in all the courts. Thus even though there was no formal prayer was asked for (sic), no prejudice has been caused to the appellant inasmuch as he has not been prevented from leading evidence on this aspect and has not been precluded from raising contentions in this behalf. In our view, all that was necessary to cure the defect was an amendment by incorporating one prayer. This could have been done at any stage. In this view of the matter and particularly in view of the fact that we are in agreement with the findings that the property is a trust property and that the lease in question was not for consideration or for legal necessity, we see no reason to interfere."

12. The learned Counsel appearing for the Appellant referring to the said decision submitted that in the case before the Apex Court, the transaction was totally void and that is the reason why the Apex Court held that the failure to claim declaration was not fatal. There is no merit in the said contention. The Apex Court has

held that considering the averments made in the plaint and considering the fact that the parties knew that the lease deed was being challenged the suit was maintainable though no prayer was made that the lease deed was not valid and/or was void and/or was not binding.

13. The plaint will have to be read as a whole for considering the issue of maintainability. The test adopted by the Apex Court in the decision of Santok Singh (supra) appears to be on the basis of the knowledge of the parties regarding the challenge involved and the prejudice to the parties. In the facts of the case in hand, there cannot be any question of prejudice as issues are framed and parties have been permitted to lead evidence. Therefore, in my opinion, in the facts of the case failure to claim declaration as regards the sale deed and failure to pray for setting aside the sale deed will not be fatal. The Appellate court in paragraphs 16 and 17 of the Judgment has dealt with the said aspect and in my opinion rightly. The Appellate Court has rightly held that the suit will be governed by Article 109 of the Limitation Act 1963 and therefore, the period of limitation will not be 3 years, but 12 years.

14. In this view of the matter there is no merit in the Second Appeal and the Second Appeal is dismissed with no order as to costs.

Judge.